
Case No.: UNDT/NY/2011/015

Order No.: 83 (NY/2011)

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

HASSANIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

REASONED ORDER
ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By way of application filed on 17 February 2011, the Applicant sought a suspension of action of the decision to suspend payroll deductions from his salary for his union membership dues and to suspend their remittance to the United Nations Staff

Facts

5. The Applicant contended that “some years ago” he requested UNSU to submit to OPPBA his written authorisation to ~~have~~ a deduction from his salary as his contribution to UNSU (that is, his “dues”), ~~in~~ accordance with the relevant staff rules (currently, staff rules 3.17(c)(v) and 8.1(~~g~~)). ~~It~~ is common cause that the standard form stipulates that “the written authorisation ~~remains~~ valid until ~~cancelled~~ in writing”, and that the Applicant has ~~not~~ cancelled such authorisation.

6. It was submitted by the parties that ~~on~~ June 2010, at the request of the

10. For the sake of convenience, the Tribunal set out the Respondent's general submissions first, to be followed by the Applicant's contentions.

Respondent's submissions

11. The Respondent's primary contentions may be summarised as follows.

Receivability

a. A request for suspension of action may only be granted in situations where the impugned decision has not been implemented. The Respondent considers that this understanding of the rule has been confirmed by the Tribunal in several decisions, such as *Barringer* UNDT/2010/216 and *Neault* Order No. 6 (GVA/2011).

b. The email dated 28 January 2011 is not an administrative decision within the meaning of art. 2.2 of the Tribunal Statute—that is, it does not constitute an individual administrative decision taken in a distinct individual case, creating direct legal consequences to the legal order. Rather, the email contains information to the effect that the Administration is temporarily suspending a voluntary service provided pursuant to staff rule 3.17(v). The suspension of the service provided by OPPBA does not carry sufficient direct legal consequences in respect of the Applicant's rights under the terms of his appointment or contract of employment. More specifically, the email does not change the legal order set out in staff regulation 8.1 and staff rule 8.1.

Prima facie unlawfulness

c. There is no evidentiary basis available upon which the Tribunal can reasonably conclude that there exist serious and reasonable doubts about the lawfulness of the contested decision. The Applicant has not shown how the contested decision contravenes his contract of employment or his terms of appointment.

was sent to him and other staff members in a “blind copy” (cc). Therefore, the staff members do not know which other staff members received it.

Urgency

h. The Applicant has not demonstrated that the matter before the Tribunal is urgent. There are other avenues available for the Applicant and other staff to pay membership dues to UNSU.

i. The contested decision has already been implemented. Accordingly, there is no particular urgency which requires suspending a decision that has already been implemented.

Irreparable damage

j. The Applicant has not shown how the contested decision would cause irreparable harm to his rights as staff member. There are other avenues available for the Applicant and other staff to pay membership dues to UNSU.

Applicant's submissions

12. The Applicant's primary contentions may be summarised as follows.

Receivability

a. The action of implementing the decision is ongoing and will continue for some time. The action taken by the Respondent, and his pending refund of the

not negate the fact that a distinct administrative action was taken against the

g. The decisions to suspend the remittance of UNSU dues to its bank accounts and to suspend the deduction of the dues through payroll violates:

i. the principle of freedom of association and the Applicant's right

the UNSU, and is responsible for all correspondence on policy matters between the UNSU and other parties.

j. The authority to designate the bank accounts where the Applicant's contribution to his Staff Union is deposited is vested in the President of the Union and, in his absence, the First Vice-President. The authority to delegate the administration of UNSU finances to a Treasurer with responsibility for finance is vested in the President of the Staff Union and, in his absence, the First Vice-President.

Urgency

k. The contested decisions have interfered with the election process for the 44th staff council, as sec. 13.3 of the UNSU

n. The decision will allow the Respondent to interfere in UNSU affairs and will undermine the right to freedom of association, which will affect the Applicant as a staff member.

Considerations

13. At the commencement of the hearing in this matter, the parties were informed that the proceedings before the Tribunal, like criminal proceedings or proceedings in a civil court, are not *stricto sensu* adversarial in nature. The Tribunal highlighted that this was a very serious matter concerning basic fundamental rights to freedom of association, with the potential for much wider consequences, which required a resolution as soon as possible with a view to ensuring harmonious industrial relations. Following appropriate directions regarding the Tribunal's tentative view on the legal position of both parties, an effort was made

decision to place a staff member on administrative leave without pay during a certain period of time had continuous legal effect during that period of time and could only be deemed to have been implemented in its entirety at the end of the administrative leave (rather than when the decision was first notified). At this juncture the Tribunal wishes to point out that in accordance with the duty of fidelity, as well as general courtesy, it is incumbent upon Counsel to bring any conflicting authorities to the Tribunal's attention, and to make the necessary persuasive arguments as to why they should not be followed or clearly distinguished from the matter in hand.

15. I am not entirely convinced that it is a correct interpretation of the law and jurisprudence for the Respondent to argue that every decision that has been "implemented" (in the sense the Respondent uses the word) will be unable to be suspended by an order for suspension of action. To allow the Respondent's interpretation would be to render the Tribunal impotent. It cannot have been the intention of the drafters of the Statute that the Tribunal should have no power to dispense justice (in this context, by granting urgent and limited interlocutory relief) where the Respondent notifies a staff member of a decision at the time of, or at the eleventh hour before the "implementation" of a decision. This would allow even the most tainted and unlawful decision to stand long as it has been implemented hastily.

16. In this case, it is the considered view of the Tribunal that the decision to suspend the monthly deductions from the Applicant's salary and to suspend the remittance thereof are being actively implemented on a month-to-month basis and are therefore still ongoing. In this regard the Respondent's contention on this ground must fail.

Whether the decision constitutes an administrative decision

17. The second point taken by the Respondent is that the Applicant contests a decision that is not reviewable as it does not constitute an "administrative decision" within the meaning of art 2 of the Tribunal's Statute that is, according to the definition outlined by the Respondent, one taken in a distinct individual case and having

Convention, 1948, and C98 Right to Organise and Collective Bargaining Convention, 1949, two core conventions of the ILO.

23. The Tribunal has previously discussed at length that general principles of international law and norms are relevant in its interpretation of a staff member's rights in the context of their terms of appointment (see *deijn* UNDT/2011/032). In *Kisambira* Order No. 36 (NY/2011) the Tribunal held that, in accordance with general principles of international law and norms (including as expressed in international instruments on the right to freedom of association and collective bargaining), the Respondent has an obligation to facilitate organisational rights. One of the basic organisational rights is the right of a union to request an employer to make deductions of and to pay over union membership subscriptions, also known as "check-off" rights. Such a right, if not catered for by statute in a recognition agreement or by negotiation, can become a recognised organisational right as a result of established past practice. The benefits of a recognised organisational right are conferred on every individual member. In this case, particularly where the deduction and remittance of the membership dues is a long established practice, the Respondent has recognised this organisational right and cannot now withdraw it unilaterally.

24. The Respondent maintains that the Applicant has not shown how the contested decision contravenes his contract of employment or his terms of appointment. In particular the Respondent maintains that OPBA has been providing the service of collecting the dues on a voluntary basis and furthermore, that the authorisation to deduct union dues does not allow for these funds to be kept in trust for a prolonged period of time.

25. In terms of staff rule 3.17(c)(v), contributions may be deducted from payroll for transmission to a staff representative body established pursuant to staff regulation 8.1, provided that each staff member has opportunity to withhold his consent or at any time to discontinue such deduction by notifying the Secretary-General. The Applicant has shown by documentary evidence, and the Respondent has not refuted, the origin of this staff rule pursuant to a recommendation of the SMCC in 1984. The Tribunal finds

therefore that the unilateral decision ~~to~~ Respondent to suspend deduction of the contributions violates both that agreement and the particular staff rule in so far as it pertains to the Applicant.

26. It is common cause that the Applicant has given no instruction for the

Urgency

30. The Respondent contends that the Applicant has not satisfied the requirement of urgency. The Applicant on the other hand maintains that the contested decision has interfered with the election process for the 4th Staff council (which should normally be undergoing at present), as sec. 13.3 of the SUNS Statute and Regulations requires that all candidates for election to office must be dues-paying members in good standing with UNSU. Therefore the Applicant's eligibility for election to office is affected by the contested decision and, given the Applicant's unchallenged assertion that the elections should be underway already, the Tribunal finds the requirement of urgency satisfied.

Irreparable harm

31. The Respondent contends that the Applicant has not shown that the contested decision would cause irreparable harm to his rights as a Staff member and that there are other avenues available for the Applicant (and

Human Rights and art. 7 of the International Covenant on Economic
Social and Cultural Rights which the Appeals Tribunal stated *Tabari*

permit a clarification of the situation from a legal point of view for the purpose of settling the question of leadership and representation of the organisation concerned. However, the Dispute Tribunal does not entirely have jurisdiction of this nature.

37. Paragraph 1123 of the Digest of Decisions provides that conflicts within the trade union lie even outside the competence of the Committee and should be resolved by the parties themselves by recourse to the judicial authority or an independent arbitrator. This Tribunal has jurisdiction regarding staff associations or the internal disputes within a staff union, its membership or executive. The only available recourse in terms of the UNSU Statute would be the Arbitration Committee. The Tribunal was advised that despite provision for an arbitration committee, UNSU has failed since the inception of its Statute and Regulations in 2007 to install such a committee. It is unfortunate that the Union has not established the Arbitration Committee; perhaps the moment is opportune.

38. I turn now to the practicalities of the order made in favour of the Applicant. Whilst the Respondent has not specifically alleged frustration of any contract, the contention is that the Administration is liable to pay the dues directly to either the UNFCU or Citibank bank accounts of UNSU as a result of the contradictory instructions from UNSU office bearers as the designated account. The Applicant contended that the Respondent had at all times in the past dealt with the President alone. According to the Applicant, it is the UNSU President who designates the account into which the funds are deposited, although article 10.6 of the UNSU Statute states that the Treasurer shall collect all monies due to the Staff Union and deposit its funds in its name and in conjunction with the President, propose an investment policy for such funds subject to approval by the Council. The Applicant however contends that the President delegates authority to the Treasurer to perform these functions. At all events, this is not a matter over which the Tribunal has jurisdiction to exercise judicial function, and these comments are made as observations only.

39. In the Tribunal's view, there are some aspects of this case that are perplexing, if not troubling. The Respondent has been less forthcoming with information which

must surely be within the Administration's provenance. Counsel for the Respondent was unable to say who gave the original instruction regarding booking arrangements to the Administration, and was unable to provide any documentation or record of correspondence between the Staff Union and the Administration. The Tribunal finds it strange that there is no documentation as to whether going over a period of several